[Cite as *State v. Rivera*, 2010-Ohio-323.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-12-308
	:	O P I N I O N
- vs -		2/1/2010
	:	
ARMANDO RIVERA,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-02-0297

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BRESSLER, P.J.

{¶1} Defendant-appellant, Armando Rivera, appeals his convictions in the Butler County Court of Common Pleas for compelling prostitution.

{¶2} In November 2007, a high school student in Butler County informed his teacher that appellant was his former boss at Wonderpark Family Entertainment in Cincinnati, and that he believed appellant paid other high school students for photographs and films of themselves engaged in sex acts. The student indicated he had not taken part in this activity, nor did appellant personally ask him to do so.

However, the student indicated appellant paid several young boys for photographing and filming themselves masturbating and engaging in sex acts with appellant.

{¶3} The teacher then contacted the Fairfield Police Department, and Fairfield police officers began an investigation. During the investigation, Fairfield police officers obtained appellant's cell phone number, which appellant used to communicate with the boys. Pursuant to Section 2703(d), Title 18, U.S.Code, also known as the Stored Communications Act ("the Act"), Detective Mike Woodall obtained records of text messages from appellant's cell phone service provider, Sprint Nextel. These text messages contained communications between appellant and the boys, including negotiation of payments, arrangement and scheduling of the activities, and discussion of the activities. Detective Woodall then obtained search warrants to search appellant's home, car, and place of business.

{¶4} On January 28, 2008, appellant was arrested and transported to the Fairfield police station. That day, appellant signed a written waiver of his *Miranda* rights. During the interview appellant was informed that the officers had obtained his cell phone text messages. At the conclusion of the interview, appellant provided a written statement, in which he admitted to participation in these activities. On May 7, 2008, appellant was indicted on seven counts of compelling prostitution in violation of R.C. 2907.21(A)(2).

{¶5} On August 8, 2008, appellant moved to suppress all text and picture messages sent or received by appellant, all evidence seized pursuant to search warrants, and all statements made by appellant. On September 12, 2008, appellant filed a supplemental motion to suppress and also moved to declare Sections 2703(b)-(d), Title 18, U.S.Code unconstitutional. While the record does not include a journalized entry by the trial court on these motions, both parties agree the trial court overruled all of

appellant's motions. Subsequently, appellant entered no contest pleas to all charges. The trial court found appellant guilty on all charges and imposed a seven-year prison term. Appellant now appeals his convictions and the trial court's decisions denying his motions to suppress evidence and to declare Sections 2703(b)-(d), Title 18, U.S.Code unconstitutional. Appellant raises two assignments of error, but we address them together.

{¶6} Assignment of Error No. 1:

{¶7} "THE COURT BELOW ERRED WHEN IT DENIED MR. RIVERA'S MOTION TO DECLARE AS UNCONSTITUTIONAL 18 U.S.C. § 2703(B) – (D)."

{¶8} Assignment of Error No. 2:

{¶9} "EVEN IF THE S.C.A. IS NOT UNCONSTITUTIONAL, THE COURT BELOW ERRED WHEN IT DENIED MR. RIVERA'S MOTION TO SUPPRESS."

{¶10} Appellant argues that the Act is facially unconstitutional, in that it abridges the protected Fourth Amendment privacy rights of individuals in the content of their private, electronic communications. Further, appellant argues the seizure of his private electronic communications and all other evidence seized as a result should have been suppressed.[1]

{¶11} The Fourth Amendment to the United State Constitution guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

{¶12} While the Fourth Amendment does not contain an express mandate that

1. As a preliminary matter, we note that despite the absence of a journalized entry denying appellant's motion to declare Sections 2703(b)-(d), Title 18, U.S.Code unconstitutional, an appellate court may

evidence seized as a result of an illegal search must be suppressed, the exclusionary rule is inherent in the language of the amendment. *State v. Acord*, Fayette App. No. CA2009-01-001, 2009-Ohio-4263, ¶14. "The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *United States v. Leon* (1984), 468 U.S. 897, 906, 104 S.Ct. 3405, citing *United States v. Clandra* (1974), 414 U.S. 338, 348, 94 S.Ct. 613.

{¶13} Congress enacted the Act in 1986, which is codified at Sections 2701 to 2712, Title 18, U.S.Code, and contains provisions pertaining to the accessibility of "stored wire and electronic communications and transactional records." The Act "prohibits unauthorized access to certain electronic communications, and places restrictions on a service provider's disclosure of certain communications. It also permits a 'governmental entity' to compel a service provider to disclose the contents of communications in certain circumstances." (Internal citations omitted.) *Warshak v. United States* (C.A.6, 2008), 532 F.3d 521, 523 (*Warshak II*).

{¶14} The compelled-disclosure provisions in the Act provide different levels of privacy protection based on whether the electronic communication is held with an electronic communication service or a remote computing service, and based on the length of time the electronic communication has been in electronic storage. Id. When an electronic communication has been in electronic storage for more than 180 days, the government may compel an electronic communication service provider to disclose the contents of the communication by: 1) obtaining a warrant; 2) using an administrative subpoena; or 3) obtaining a court order pursuant to Section 2703(d), Title 18, U.S.Code.

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presume a trial court overruled a motion when a trial court fails to rule on a motion. *State v. Chamberlain* (Jan. 31, 2000), Madison App. No. CA99-01-003.

Id.; Section 2703(a),(b), Title 18, U.S.Code. However, when an electronic communication has been in electronic storage for less than 180 days, the government may compel an electronic communication service provider to disclose the contents of the communication only by obtaining a warrant. Section 2703(a), Title 18, U.S.Code.

{¶15} Pursuant to Section 2703(d), Title 18, U.S.Code, "a court of competent jurisdiction" may issue an order based on "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." Id. at 524; Section 2703(d), Title 18, U.S.Code.. Although the Act generally requires the government to provide notice of disclosure to the user unless it obtains a warrant, the Act contains an exception, which permits the government to delay notice if notification would result in "(A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial." Id., Sections 2703(b)(1)(B), 2705(a)(2), 2705(a)(4), Title 18, U.S.Code. See, also, Section 2705(b), Title 18, U.S.Code.

{¶16} Despite being enacted in 1986, the Act has rarely been challenged as facially unconstitutional, and there is no valid legal decision declaring the constitutionality of the Act. In *Warshak v. United States* (C.A.6, 2007), 490 F.3d 455 (*Warshak I*), the Sixth Circuit Court of Appeals declared portions of the Act unconstitutional, but later vacated its decision in *Warshak II*, finding that Warshak's constitutional claims were not ripe for review. In *Warshak I*, Warshack sought injunctive relief to prevent the government from obtaining any further emails during its investigation. However, this case is different in that the government obtained text

messages that were used to secure a search warrant and obtain a confession from appellant. Accordingly, appellant's claims are ripe for review.

{¶17} Several courts have considered the constitutionality of the Act as applied to particular defendants. See *United States v. Hart* (W.D.Ky.2009), Slip Op. Criminal Action No. 08-109-C, 2009 WL 2552347; *Quon v. Arch Wireless Operating Co., Inc.* (C.A.9, 2008), 529 F.3d 892; *United States v. Ferguson* (D.C.Cir.2007), 508 F.Supp.2d 7. However, even where courts have found the government violated the provisions of the Act, courts have routinely held that exclusion of improperly obtained evidence is not the appropriate remedy. See, e.g., *Hart*; Section 2708, Title 18, U.S.Code.

{¶18} The Act permits both criminal prosecutions and civil actions for violations of its terms. Sections 2701, 2707, and 2708, Title 18, U.S.Code; see, also, *Hart* at *21. Specifically, in criminal prosecutions, both fines and imprisonment can be imposed, and in a civil action, preliminary, and other equitable or declaratory relief, damages, and attorney fees are available. Sections 2701 and 2707, Title 18, U.S.Code.

{¶19} Also, the Act provides that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." Section 2708, Title 18, U.S.Code. As the court stated in *Hart* at *21, "[n]owhere in either § 2701 or § 2707 is there any inclusion of suppression as remedy for a violation of any of the Act's provisions. Nor is there any suggestion from the legislative history that Congress intended suppression to be available for a technical violation. Lastly, and although this remains a developing area of the law, the courts that have generally wrestled with import of violations of the Stored Communications Act are agreed, at a minimum, that suppression is not available solely on the basis of a violation of the Act's terms." (Internal citations omitted.) See, also, *Ferguson* (even if the government does not comply with the provisions of the Act, the statute does not provide

for a suppression remedy); *United States v. Smith* (C.A.9, 1998), 155 F.3d 1051 (holding that "the [Act] does not provide an exclusion remedy. It allows for civil damages * * * and criminal punishment * * * but nothing more"), superseded on other grounds; *United States v. Steiger* (C.A.11, 2003), 318 F.3d 1039 (the Act creates criminal and civil penalties, but no exclusionary remedy, for unauthorized access to a facility through which an electronic communication service is provided to obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage in such system).

{¶20} Further, to the extent that appellant argues the government's alleged violation of the Act violates the privacy protections of the Fourth Amendment, appellant's argument must fail. *States v. Cray* (S.D.Ga.2009), Slip Op. No. CR 109-074, 2009 WL 4059071. As stated by the United States District Court for the Southern District of Georgia in *Cray* at *6, "[i]mportantly, a right bestowed by Congress does not create a constitutional right, and does not trigger the exclusionary rule. 'The rights created by Congress are statutory, not constitutional.' * * * [A] statutory violation by itself is insufficient to justify the exclusion of any evidence obtained in that manner. * * * Violation of a statute will not result in suppression unless the statute itself specifies exclusion as a remedy." (Internal citations omitted.)

{¶21} Moreover, several courts have declined to rule on the constitutionality of the Act when the government's reliance on the Act being constitutional was in good faith and objectively reasonable. For example, in *Ferguson*, 508 F.Supp.2d 7, the United States District Court for the District of Columbia reiterated that the Fourth Amendment's exclusionary rule does not apply where the challenged evidence was obtained by an officer acting in objectively reasonable reliance on a statute, even if that statute was later determined to be unconstitutional.

{¶22} According to the court in *Ferguson* at 9, "[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." The court in *Ferguson* applied this rule to the Act, and found that regardless of the constitutionality of the Act, the government's reliance on the Act was objectively reasonable under *Leon*, 468 U.S. 897. See, also, *United States v. Webb* (D.C.Cir.2001), 255 F.3d 890, 904 (declining to rule on constitutionality of search warrant and instead holding that officer's reliance on warrant was objectively reasonable under *Leon*); *United States v. Vanness* (C.A.10, 2003), 342 F.3d 1093, 1098 (court may conclude that officer relied in good faith on town ordinance without determining its constitutionality).

{¶23} Also, as the court noted in *Ferguson* at 9, "[a]cts of Congress are entitled to a strong presumption of constitutionality. * * * The [Act] was enacted in 1986. Prior to the district court's ruling in *Warshak* in 2006, twenty years after enactment of the SCA, no court had ruled that the Act was unconstitutional." Further, the court in *Ferguson* also found it important that the court orders obtained under the Act were approved with the legal judgment of a neutral magistrate. Id.

{¶24} According to the record in this case, Detective Woodall obtained appellant's text message records that were less than 180 days old by using a court order rather than a warrant as required by Section 2703(a), Title 18, U.S.Code. Further, Detective Woodall did not provide notice to appellant as required by Section 2703(b)(1)(B)(ii), Title 18, U.S.Code. We find these to be violations of the Act. However, as we indicated above, Congress included several remedies for violations of

the Act but did not include exclusion of as a remedy. Further, despite having the opportunity to do so, several courts have declined to hold that exclusion is a remedy for a violation of the Act. Accordingly, this court does not find it appropriate to permit exclusion as a remedy for violations of the Act. Moreover, we find it was objectively reasonable for Detective Woodall to rely on the Act being constitutional, as the Act has not been found to be unconstitutional, and Detective Woodall obtained the court order from a neutral and detached magistrate. Therefore, we find that the exclusionary rule is inapplicable to the evidence obtained in violation of the Act.

{¶25} To benefit from the protection provided by the Fourth Amendment, appellant must demonstrate that he suffered a violation of a constitutional right. At best, appellant has demonstrated that he suffered a violation of a statutory right. Because appellant has not demonstrated any valid privacy interest that invokes Fourth Amendment protection and the remedy he seeks for a nonconstitutional violation is impermissible, we need not determine whether the Act is facially unconstitutional. See *Cray.*

{¶26} Next, we turn to appellant's argument that the trial court erred in denying his motion to suppress evidence seized from his residence and the statement appellant provided. Appellant maintains the affidavit in support of the search warrant lacked probable cause to support the issuance of the warrant.

{¶27} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Id. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*,

Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶28} Crim.R. 41(C) governs the issuance of search warrants, and states in pertinent part, "a warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located."

{¶29} However, the exclusionary rule is unnecessary when law enforcement properly executes a legal warrant issued by a detached judge that is supported by probable cause. *Acord* at ¶15, citing *State v. George* (1989), 45 Ohio St.3d 325. In determining whether probable cause exists to support the issuance of a warrant, courts employ a "totality-of-the-circumstances" test, which requires an issuing judge "to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit * * * including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Moore*, Butler App. No. CA2005-08-366, 2006-Ohio-4556, ¶11, quoting *George*, 45 Ohio St.3d at 329.

{¶30} When reviewing a finding of probable cause in a search warrant affidavit, reviewing courts "may not substitute their own judgment for that of the issuing magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which the reviewing court would issue the search

warrant. On the contrary, reviewing courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *George* at 330. "The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Moore* at ¶12.

{¶31} With regard to hearsay information in a search warrant application, Ohio courts have determined that hearsay evidence is relevant to a probable cause determination. Id. at ¶13. Where a confidential or anonymous informant is the source of the hearsay, there must be some basis in the affidavit to indicate the informant's credibility, honesty or reliability. See *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380, ¶20. An affidavit containing detailed information from informants (permitting an inference that illegal activity was personally observed by the informants), police corroboration of an informant's [information] through its own independent investigation, or additional testimony by the affiant helps to bolster and substantiate the facts contained in the affidavit." Id., citing *State v. Ingram* (Sept. 26, 1994), Butler App. No. CA94-03-076, 4-5.

{¶32} In Detective Woodall's affidavits, he stated he received a report from his department that a student, J.M., had confided in his teacher that he and several other kids had recently been fired from Wonderpark, and that as a way of getting back at their manager, appellant, for firing them, they were thinking about reporting appellant's misconduct. J.M. elaborated that appellant pays kids $50 to masturbate in front of him while he takes pictures of the kids on his cell phone. J.M. said he did not participate in this but that several of the other employees did so and were paid for it.

{¶33} Detective Woodall also included notes from another officer's interview with J.M., which included additional facts that appellant conducted this activity with

approximately 12 boys. J.M. stated that after a boy has worked at Wonderpark for awhile, appellant will approach him and ask if he wants to make a lot of money easily. The boys who agree make the movies either at the restroom in Wonderpark, at their own homes, or at appellant's home. J.M. stated that appellant pays the following: $50 for a 24-second film, $100 for an eight-minute film, and $150 for a full movie. J.M. further stated that appellant sends the films to contacts in another country to be processed into movies.

{¶34} Detective Woodall stated that he interviewed J.M. himself and obtained the names and cell phone numbers of some of the other employees at Wonderpark. J.M. explained to Detective Woodall that appellant did not approach him directly about this activity, but that appellant told J.M. to talk to D.H., another employee, about making extra money. It was D.H. who provided J.M. with the information that J.M. reported about appellant. J.M. also provided Detective Woodall with appellant's cell phone number.

{¶35} Detective Woodall then explained that he received 121 pages of text messages from appellant's cell phone provider, and that after reviewing these messages, Detective Woodall was certain that appellant had been soliciting boys for sexually explicit material. Detective Woodall included a portion of these messages where someone using appellant's cell phone offered between $100 and $300 for pictures and videos of known juveniles masturbating and performing sex acts.

{¶36} Given that we place significant deference to the judge's determination of probable cause, even if we ignore the contents of the text messages, we find that based upon the facts and circumstances alleged in Detective Woodall's affidavits, there was a substantial probability that evidence used to facilitate the act of compelling prostitution would be found in appellant's home, vehicle, and workplace. Therefore, the affidavits

were in compliance with Crim.R. 41(C) and provided ample probable cause on which to issue the warrants.

{¶37} Accordingly, appellant's assignments of error are overruled.

{¶38} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.